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EXECUTIVE SECRETARY

September 24, 1999

VIA FEDERAL EXPRESS

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

**In re: Show Cause Proceeding Against Minimum Rate Pricing, Inc.
Docket #98-00018**

Dear Mr. Waddell:

Enclosed for filing is an original and fourteen (14) copies of Minimum Rate Pricing, Inc.'s Petition for Reconsideration of September 16, 1999 Order. Please file the original and thirteen of the copies and date stamp and return the other copy to me in the prepaid envelope provided.

Thank you.

Very truly yours,



Adrienne M. Bauer
Legal Assistant

/amb
enclosure
cc: Sarah B. Colley, Esq.

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

REGULATORY AUTHORITY

'99 SEP 27 AM 11 49

IN RE:)
)
SHOW CAUSE PROCEEDING)
AGAINST MINIMUM RATE PRICING,)
INC.)
)

DOCKET NO: 98-00018
EXECUTIVE SECRETARY

MINIMUM RATE PRICING, INC.'S PETITION FOR RECONSIDERATION OF SEPTEMBER 16, 1999 FINAL ORDER

Minimum Rate Pricing, Inc. ("MRP"), by and through its undersigned counsel, respectfully files this Petition for Reconsideration of the Final Order entered by the Authority on September 16, 1999, stating as follows:

On September 16, 1999 the Authority entered a Final Order which, among other things:

1. Stated that it contains the Findings of Fact and Conclusions of Law which were determined at the Authority's April 27, 1999 Conference.
2. Ordered that, "[b]ased on the record in this proceeding, Minimum Rate Pricing, Inc. is in violation of Tenn. Comp.R. & Regs. R. 1220-4-2-.13(3); 1220-4-2-.56(1)(d); 1220-4-2-.56(d)(2), (d)(5), (d)(9); 1220-4-2-.56(1)(e); 1220-4-2-.56(2),; and Tenn. Code Ann. § 65-4-125."
3. Ordered that ". . . the Certification as an operator service provider and reseller of telecommunications services granted to Minimum Rate Pricing, Inc. by Order of the Tennessee Regulatory Authority entered in Docket No. 97-01227 on July 18, 1997, is revoked effective April 27, 1999, the date this decision was rendered."
4. Order that ". . . Minimum Rate Pricing, Inc. and its agents, representatives, employees, owners, assigns, subsidiaries or other related companies are prohibited, directly or indirectly, under its current name or another name, from soliciting any new customers in the State of Tennessee effective April 27, 1999."
5. Ordered the Executive Secretary of the Authority ". . . to advise all telecommunications services providers of the revocation of MRP's certificate, as necessary to protect the public interest."

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6. Ordered that “[a]ny party aggrieved with the Authority’s decision in this matter may file a Petition for Reconsideration with the Authority within ten (10) days from the date of this Order.”

MRP has filed a timely Petition for Reconsideration of the Authority’s May 11, 1999 Order, which stated that the Authority affirmed the Notice of Revocation of Certification of Minimum Rate Pricing, Inc. dated April 27, 1999. As of this date the Authority has never acted on the Petition for Reconsideration of the May 11, 1999 Order.

MRP states the following in support of its Petition for Reconsideration:

1. The Authority has failed to act on MRP’s Petition for Reconsideration of the Authority’s May 11, 1999 Order.

1. The Authority’s April 29, 1999 decision to revoke the certification of Minimum Rate Pricing, Inc., the Authority’s May 11, 1999 Order and the Authority’s September 16, 1999 Final Order are in error because they are not supported by either the facts or the law. MRP respectfully refers the Authority to MRP’s Proposed Findings of Fact and Conclusions of Law and its Petition for Reconsideration of the Authority’s May 11, 1999 Order for a fuller exposition of the correct legal and factual analysis that the Authority should have followed in deciding this matter. By way of illustration, although MRP raised the issue, the Authority’s Final Order does not purport to resolve the threshold issue of whether the assignment of the “burden of proof” to MRP refers to the burden of producing evidence or the burden of persuasion or to clearly state whether its findings of fact and conclusions of law used the burden of producing evidence or the burden of persuasion standard.

2. The Commission’s decision to revoke MRP’s certification to provide *intrastate* long distance telecommunications services constitutes an illegal attempt by the Authority to regulate *interstate* long distance telecommunications services in violation of the preemption provisions of Section 258 of the Communications Act of 1933, as amended by the Telecommunications Act of 1996 (42 U.S.C. Section 258). That preemption also has the effect of prohibiting the Authority and other state agencies from exercising jurisdiction over the *interstate* activities of a reseller. The

interstate and *intrastate* aspects of the provision of long distance telephone service are so “inextricably intertwined” that binding Federal precedent mandates that federal law preempts all state regulation concerning the switching of a telephone subscriber’s long distance provider. The preemptive effect of the Communications Act is described in detail in MRP’s Proposed Findings of Fact and Conclusions of Law and will not be repeated here. Although MRP timely raised this issue, the Authority’s Final Order does not purport to address or resolve it.

3. The Attorney General of Tennessee has participated in this proceeding as an intervener and also has purported to represent and speak for the Authority in this proceeding. These dual and inconsistent roles were pointed out to the Authority in an April 13, 1999 letter to K. David Waddell; the April 5, 1999 letter from Kathleen Ayres which evidences the Attorney General’s dual and inconsistent roles was attached as Exhibit 1 to the April 13, 1999 letter. The Attorney General’s representation of the Authority in a proceeding before the Authority in which the Attorney General is an intervener constitutes an impermissible conflict of interest and has fatally infected this entire proceeding. Although MRP timely raised this issue, the Authority’s Final Order does not purport to address or resolve it.

4. The Attorney General and the Authority apparently had *ex parte* communications about matters on which the Authority later made rulings. These apparent *ex parte* communications were pointed out to the Authority in an April 13, 1999 letter to K. David Waddell; the April 5, 1999 letter from Kathleen Ayres which evidences these facts was attached as Exhibit 1 to the April 13, 1999 letter. The apparent *ex parte* communications between the Attorney General and the Authority regarding matters to be considered and ruled on by the Authority in a proceeding before the Authority in which the Attorney General is an intervener has fatally infected this entire proceeding.

5. The Authority decided this matter on April 27, 1999 despite the fact that the instant Show Cause proceeding has been automatically stayed by Section 362 of the Bankruptcy Code, 11 U.S.C. Section 362. *Fugazy Express, Inc. v. Shimer*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992). Any issue regarding the scope and effect of the automatic stay and any

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request for relief from the automatic stay must be presented to and resolved by the United States Bankruptcy Court for the District of New Jersey, Newark Division.

6. The May 11, 1999 Order of the Authority apparently was never served on MRP or its counsel by the Authority's Executive Secretary. Counsel for MRP only discovered the existence of the May 11, 1999 Order after he called the attorney for the Authority staff, Gary Hotvedt, on May 17, 1999 after two attempts to contact the Executive Secretary by telephone did not elicit any response from the Executive Secretary. This apparent failure by the Authority to serve an Order with a ten day requirement for filing a Petition for Reconsideration severely hampered MRP's ability to file a timely and complete Petition for Reconsideration of the May 11, 1999 Order and constitutes a denial of MRP's due process rights.

7. At the Authority's April 27, 1999 meeting where it considered the instant matter, the Authority improperly considered allegations made against MRP and an MRP witness, Drew Keena, in a document filed by the Attorney General on March 25, 1999 entitled "Motion for Exercise of Regulatory Police Power to Protect the Public Interest." By way of illustration, at its April 27, 1999 meeting, the Authority clearly relied on the allegations in this March 25, 1999 filing by the Attorney General to determine the credibility of Mr. Keena. The consideration of and reliance on allegations and "evidence" proffered by the Attorney General after the close of the hearings and the close of the evidentiary record was improper and a denial of MRP's due process rights.

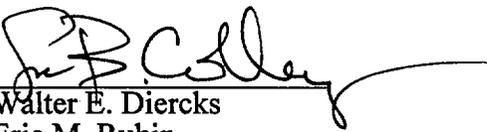
For the foregoing reasons, Minimum Rate Pricing, Inc. respectfully moves that the Authority reconsider 1) its April 27, 1999 action revoking the certification of Minimum Rate Pricing, 2) its April 27, 1999 Notice of Revocation of Certification of Minimum Rate Pricing, Inc. (the "Notice of Revocation"), 3) its May 11, 1999 Order affirming the April 27, 1999 Notice of Revocation, and 4) its September 16, 1999 Final Order and that the Authority 1) rescind its April 27, 1999 action revoking the certification of Minimum Rate Pricing, Inc., 2) rescind its April 27, 1999 Notice of Revocation, 3) vacate its May 11, 1999 Order and 4) vacate its September 16, 1999 Final Order.. The Authority should then submit the question of whether the instant proceeding is subject to the

automatic stay to the United States Bankruptcy Court for the District of New Jersey, Newark Division for resolution. If, after granting the relief set forth in above, the Authority continues to assert jurisdiction over this matter despite the automatic stay, the Authority should at the very least:

- 1) dismiss the Consumer Advocate Division of the Office of the Attorney General of Tennessee (the "CAD") as an intervener because of the conflict of interest and the *ex parte* communications described above,
- 2) exclude from consideration any evidence submitted by the CAD in this matter,
- 3) exclude from consideration any testimony adduced by the CAD at the hearing in this matter,
- 4) exclude from consideration any oral argument or written pleading submitted by the CAD in this proceeding, and
- 5) render a decision that the record does not establish that MRP engaged in material violations of Authority Rules or Tennessee statute that require the revocation of MRP's Certificate of Authority or the imposition of substantial fines.

Dated: September 24, 1999

Respectfully submitted,

By: 
Walter E. Diercks
Eric M. Rubin
Sarah B. Colley, Tenn. BPR #17302
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Local Counsel for Minimum Rate Pricing, Inc

CERTIFICATE OF SERVICE

I, Sarah B. Colley, Attorney for MRP, do hereby certify that, this 27th day of September, I have sent a copy by first class, postage pre-paid through the U.S. Mail to:

Gary Hotvedt, Esq.
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

L. Vincent Williams, Esq.
Deputy Attorney General-Consumer Advocate
Consumer Advocate Division
Second Floor
425 Fifth Avenue, North
Nashville, TN 37243

Rochelle Weisburg, Esq.
Angel & Frankel, P.C.
460 Park Avenue
New York, NY 10022-1906

A handwritten signature in black ink, appearing to read "Sarah B. Colley". The signature is written in a cursive style with a long horizontal stroke extending to the right.

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